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## SYMPOSIUM ON INTERNATIONAL LAW AND THE RULES OF WAR: THE CRISIS OVER KUWAIT

### SPECIFIC MEANS AND METHODS OF APPLICATION OF FORCE\*

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#### I. INTRODUCTION

The focus of this symposium is the use of military force in the modern international arena with particular emphasis on the current<sup>1</sup> situation in the Arabian-Persian Gulf. The other two articles in this symposium, written by Professor David K. Linnan of the University of South Carolina and Professor George K. Walker of Wake Forest University, deal primarily with the legal aspects of resorting to the use of force both under the general principles of international law and under the Charter of the United Nations. In particular, they emphasize the role of the United Nations Security Council and the changed legal framework created by the actions

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1. This symposium evolved from papers presented at the regional meeting of the American Society of International Law, held at Duke University School of Law on November 10, 1990. The Ford Foundation generously provided funding for the conference. Prior to the editorial deadlines for the publication of these proceedings, a number of events, including the passing of the United Nations deadline for Iraq's withdrawal from Kuwait and the initiation of hostilities between United States and coalition forces and Iraq, have occurred. Just prior to the final editorial deadline, President Bush announced the cessation of all offensive operations. Where possible prior to editorial deadlines, I have taken account of these events in preparing this paper for publication.

of that body in the present situation. In the comment which follows the articles, Dr. Gennady M. Danilenko of the USSR Academy of Sciences addresses the application of humanitarian and diplomatic law to the current situation.

The outbreak of hostilities triggers a separate body of law.<sup>2</sup> Traditionally, this body of law is divided (although not cleanly so, with considerable overlap and fuzziness at the fringes) into two subdivisions. The first of these subdivisions, generally known as the "law of war," consists of a body of general principles of warfare as well as specific prohibitions and restraints on particular weapon systems and the means and methods of warfare. These restraints flow both from customary international law and a number of declarations and treaties going back as far as the middle of the nineteenth century and extending forward to as late as 1980.<sup>3</sup> The

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2. Traditionally, the law governing resort to war was referred to as *jus ad bellum*. The law governing the conduct of states engaged in war was referred to as *jus in bello*. L.C. Green, *Essays on the Modern Law of War* xix (Transnational, 1985).

3. The largest body of this subdivision is in the so-called "Hague Rules," which are found in a series of conventions and Annexed Rules adopted at the Hague Peace Conferences of 1899 and 1907. International Convention for the Pacific Settlement of International Disputes, 32 Stat 1779 (signed October 18, 1907; in force September 4, 1910); International Convention With Respect to the Laws and Customs of War by Land, 32 Stat 1803 (signed October 18, 1907; in force September 4, 1910) ("Hague II"); International Convention for Adapting to Maritime Warfare the Principles of the Geneva Convention of 22 August 1864, 32 Stat 1827 (signed October 18, 1907; in force September 4, 1910); Convention for the Pacific Settlement of International Disputes, 36 Stat 2199 (signed October 18, 1907; in force January 26, 1910); Convention Concerning the Rights and Duties of Neutral Powers and Persons in War on Land, 36 Stat 2310 (signed October 18, 1907; in force January 26, 1910); Convention Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, 3 Martens (3rd) 533 (signed October 18, 1907; in force January 26, 1910); Convention Relative to the Convention of Merchant Ships Into Warships (signed October 18, 1907; in force January 26, 1910); Convention Relative to the Laying of Automatic Submarine Contact Mines, 36 Stat 2332 (signed October 18, 1907; in force January 26, 1910) ("Hague VIII"); Convention Respecting Bombardment by Naval Forces in Time of War, 36 Stat 2351 (signed October 18, 1907; in force January 26, 1910); Convention for the Adaption of the Principles of the 1910 Geneva Convention to Maritime War, 36 Stat 2371 (signed October 18, 1907; in force January 26, 1910); Convention Relative to Certain Restrictions on the Right of Capture in Maritime War, 36 Stat 2396 (signed October 18, 1907; in force January 26, 1910); Convention Respecting the Rights and Duties of Neutral Powers in Maritime War, 36 Stat 2415 (signed October 18, 1907; in force January 26, 1910); Declaration Prohibiting the Discharge of Projectiles and Explosives From Balloons, 36 Stat 2439 (signed October 18, 1907; in force November 27, 1909) ("Hague Declaration").

Also see Final Act of the International Peace Conference, 29 July 1899, and Final Act of the Second International Peace Conference, 18 October 1907, both reprinted in English in James B. Scott, *The Hague Conventions and Declarations of 1899 and 1907* 1 (Oxford U Press, 1915). More recent additions and emendations include the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, [1975] 26 UST 571, TIAS No 8061 (signed June 17, 1979; in force February 8, 1988); Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, 6 November 1936 ("London Protocol"), 173 LNTS 353, No 4025 (1936); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, [1975] 26 UST 583, TIAS No 8062 (signed April 10, 1972; in force March 26, 1975); Convention on the Prohibition of Military or Any Other Hostile Use of Environ-

second subdivision is "humanitarian law," sometimes referred to as "Geneva law," typified by the various conventions negotiated under the auspices of the International Committee of the Red Cross ("ICRC") and the Government of Switzerland, of which the four Geneva Conventions of 1949 are the most important.<sup>4</sup> These conventions are directed toward the protection of war victims—the sick and wounded, the shipwrecked, prisoners of war ("POWs"), and civilians.

The distinctions between the two subdivisions have tended to blur in the last two decades, particularly with the negotiation and adoption of the two Protocols Additional to the 1949 Geneva Conventions of 1977.<sup>5</sup> Protocol I, for example, deals not only with the traditional humanitarian concerns of the ICRC, including elaboration of the rules protecting civilians, wounded, sick and shipwrecked in an international armed conflict, but also contains a section on the means and methods of warfare.<sup>6</sup> In this article, my primary concern will be with the first subdivision. Even by concentrating primarily on this segment, however, I am unable in an article of this length to do much more than touch on the highlights. The literature on the subject is voluminous. For those who are interested in pursuing particular aspects in more detail I have listed several modern sources that may be helpful as starting points.<sup>7</sup>

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mental Modification Techniques, [1979] 31 UST 333, TIAS No 9614 (signed December 10, 1976; in force October 5, 1978) ("Environmental Modification Convention"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) 115 (1977) (signed June 8, 1977; in force December 7, 1978) ("Additional Protocol I"); United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects, UN Doc A/CONF. 95/15, Annex I (in force December 7, 1983), reprinted in 19 ILM 1524 ("Final Report").

4. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [1955] 6 UST 3114, TIAS No 3362 (1949) (signed August 12, 1949; in force October 21, 1950) ("Geneva Convention I"); Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea [1955] 6 UST 3217, TIAS No 3363 (1949), (signed August 12, 1949; in force October 21, 1950) ("Geneva Convention II"); Convention Relative to the Treatment of Prisoners of War [1955] 6 UST 3316, TIAS No 3364 (1949) (signed August 12, 1949; in force October 21, 1950) ("Geneva Convention III"); Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 [1955] 6 UST 3516, TIAS No 3365 (1949) (signed August 12, 1949; in force October 21, 1950) ("Geneva Convention IV") (collectively, "1949 Geneva Conventions").

5. Additional Protocol I (cited in note 3); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977) 185 (1977) (signed October 18, 1977; in force December 7, 1978) ("Additional Protocol II").

6. Additional Protocol I, Part III at 141 (cited in note 3).

7. Howard S. Levie, *The Code of International Armed Conflict* (2 Volumes) (Oceana, 1986); Yves Sandoz, Christophe Swinarski and Bruno Zimmerman, eds, *Commentary on the Additional Protocols of 8*

## II. LEGAL FRAMEWORK

Most of the individual norms applicable in armed conflict flow from the basic principle that "the right of the parties to a conflict to adopt means and methods of warfare is not unlimited." This over-arching norm finds expression in several international instruments,<sup>8</sup> and it generally is recognized as having attained binding force as customary international law.<sup>9</sup> Within this over-arching norm are several general rules applicable to all weapon systems and methods of employment. These usually are considered to include the following:

- the distinction between combatants and non-combatants must be recognized;<sup>10</sup>
- non-combatants may not be made the object of direct attack;<sup>11</sup>

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*June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, 1987) ("Commentary"); Julius Stone, *Legal Controls of International Conflict* (Sydney, rev 1959); Michael Bothe, Karl Josef Partsch and Waldeman A. Solf, *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff, 1982); Dietrich Schindler and Jiri Toman, eds, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Martinus Nijhoff, 3d ed 1988) (contains perhaps the most comprehensive compilation of key documents) ("Schindler and Toman").

8. Hague II, Annexed Regulations, Art 22 at 1817 (cited in note 3); Convention Respecting the Laws and Customs of War on Land, October 18, 1907, Annexed Regulations, Art 22, 36 Stat 2277 at 2301 (signed October 18, 1907; in force January 26, 1910) ("Hague IV"); Additional Protocol I, Art 35(1) at 141 (cited in note 3).

9. Antonio Cassese, *Means of Warfare: The Present and the Emerging Law*, 12 Rev Belge de Droit Internationale 143, 144 (1976); Commentary at 390 (cited in note 7); General Counsel, US Department of Defense Letter of September 22, 1972, excerpts reprinted in Arthur W. Rovine, *Contemporary Practice of the United States Relating to International Law*, 67 Am J Intl L 118, 122 (1973) ("General Counsel, DOD Letter").

10. According to the Commentary, "The entire system established in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 is founded on this rule of customary law." Commentary at 598 (cited in note 7) (footnotes omitted). The rule is codified in Art 48 of Additional Protocol I as follows:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Commentary at 597 (cited in note 7). Additional Protocol I at Art 48 (cited in note 3). See also, General Counsel, DOD Letter at 123 (cited in note 9).

11. This principle was codified for the first time in Additional Protocol I, Art 51(2) at 147 (cited in note 3). Article 51(2), also prohibits "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population;" see also *id* Art 57(1) at 150. Although the United States has not become a party to Protocol I and has expressed its intention not to do so, the United States Government regards many of its provisions as codifications of binding customary law. See U.S. President Ronald Reagan, *Geneva Convention Protocol; Message to the Senate Transmitting the Protocol*, 23 Weekly Compilation of Presidential Doc 91 (January 29, 1987). Also see Remarks of Michael J. Matheson, Deputy Legal Adviser, Department of State, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am U J Intl L & Policy 419 (1987), and Abraham D. Sofaer, Legal Advisor, US Dept State, *The Position of the United States on Current Law of War Agreements*, 2 Am U J Intl L & Policy 471 (1987). Mr. Matheson, in his remarks, stated that one way the United States may indicate its agreement that a particular provision of Protocol I has attained the status of customary international law is by its inclusion in a military manual. *Id* at 421. It therefore should be noted that the recently published U.S. Navy

- the converse principle also applies, that is, that parties to the conflict may not intentionally use civilians as shields from attack by an enemy;<sup>12</sup>
- the means and methods of attack on a legitimate military target may not have indiscriminate effect,<sup>13</sup> as a corollary principle, weapons that cannot be directed at a specific target may not be used;<sup>14</sup>
- even where the attack is directed at a legitimate military target, if the incidental effect on non-combatants is disproportional to the value of the military advantage to be achieved, the attack may not be made;<sup>15</sup>
- the means and methods of attack may not be such as to cause superfluous injury or unnecessary suffering;<sup>16</sup>
- a combatant may not kill or wound an enemy who has surrendered, laid down his arms, or no longer has a means of defense;<sup>17</sup>
- the means and methods of warfare may not include treachery or perfidy.<sup>18</sup>

manual prohibits launching "attacks against the civilian population as such." *The Commander's Handbook on the Law of Naval Operations* (NWP-9), ¶ 8.1 (Office of Chief of Naval Operations, 1987) ("Commander's Handbook").

In an unclassified memorandum to the Deputy Assistant Secretary of Defense for Negotiations Policy, the United States Joint Chiefs of Staff forwarded a list of the articles of Additional Protocol I that should be "Recognized or Supported as Customary International Law." This list included, *inter alia*, Arts 32-34 (missing personnel), Art 45 (persons who have taken part in hostilities), Art 51(2), and Art 52(1), (2), except for the reference to reprisals, and Art 57(1), (2)(c), (4), (5) (civilians). Joint Chiefs of Staff Memorandum MJCS-49-86, March 18, 1986, "1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications" (copy on file with author).

12. Codified in Additional Protocol I, Art 51(7) at 147 (cited in note 3). The statement in the text was included in the paper at the time that the Iraqi Government was detaining a group of male non-Iraqi nationals as human shields at likely targets of attack within Iraq. Fortunately, these hostages were released. Later, however, the Iraqi military authorities stated that captured airmen from the coalition forces would be dispersed to locations expected to be objects of attack by coalition air forces. See text accompanying notes 91-92.

13. *Id.* Art 51(4) at 147.

14. General Counsel, DOD Letter (cited in note 9) recognizes this principle as a rule of customary law. It appeared in an international convention for the first time in Additional Protocol I, Art 1(4)(b) at 147 (cited in note 3).

15. Additional Protocol I, Art 51(5)(b) at 147 (cited in note 3).

16. Hague II, Art 23(e) at 1817 (cited in note 3); Hague IV, Art 23(e) at 2302 (cited in note 8); Additional Protocol I, Art 35(2) at 141 (cited in note 3). Hague II and IV and Additional Protocol I apply explicitly only to war on land. However, the general principles included in those conventions generally are regarded as a part of the customary law of warfare, and of course, "to the extent that naval hostilities may involve the use of weapons whose principal employment is in land warfare, it is clear that the rules applicable to land forces are equally applicable to naval forces." Robert W. Tucker, *International Law Studies: The Law of War and Neutrality at Sea* 50 (US Government Printing Office, 1957).

17. Hague II, Art 23(c) at 1817 (cited in note 3); Hague IV, Art 23(c) at 2302 (cited in note 8); Additional Protocol I, Art 41(2) at 142 (cited in note 3). See also Common Art 3 of the four 1949 Geneva Conventions, which lays down minimum conditions of humanitarian conduct in cases of armed conflict "not of an international character" (cited in note 4).

18. Hague II, Art 23(b) and (f) at 1817 (cited in note 3); Hague IV, Art 23(b) and (f) at 2302 (cited in note 3); Additional Protocol I, Art 37 at 141 (cited in note 3). Ruses of war are not prohibited, however. *Id.*

Some would include in this list the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."<sup>19</sup> For the reasons stated in the text accompanying notes 114 and 120 hereafter, I have not so included it.

As indicated in the previous notes, all of the principles listed above have been incorporated in at least one international convention. But their applicability to particular states as treaty law may vary because of their varying acceptance for ratification or adherence by states. The United States, for example, is not a party to Additional Protocol I, but these principles would bind all states as customary international law.<sup>20</sup>

#### A. International Efforts to Ban Specific Weapons Systems

The general principles which I have listed above, in some cases, have been fleshed out in the form of specific treaty prohibitions of, or restrictions on, the use of particular weapons systems or means of delivery. For example, the use of "dum-dum" bullets in land warfare was prohibited as early as 1868 in the St. Petersburg Declaration<sup>21</sup> as well as in a later convention.<sup>22</sup> Prohibitions against the use of asphyxiating gas have been an object of international lawmakers since the 1899 Hague Conference. That conference adopted a declaration prohibiting its use.<sup>23</sup> In 1925, a more general prohibition was adopted, which remains effective today and has received widespread adherence, including the United States and Iraq.<sup>24</sup> Unfortunately, the effectiveness of this protocol is weakened by the large number of reservations which declare that the protocol shall cease to be binding on the reserving state as to enemy states whose armed forces or allies fail to respect the prohibition.<sup>25</sup> In light of the combined effect of the large number of parties and the large number of reservations,

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19. Additional Protocol I, Art 35(3) at 141 (cited in note 3).

20. See reference in notes 9 and 11 (statements by spokespersons of the US Depts of State and Defense to the effect that the basic principles reflected in Additional Protocol I were customary international law).

21. The 1868 Declaration of St. Petersburg Forbidding Use of Certain Projectiles in Time of War. This Declaration renounced the use, in time of war, of explosive projectiles under 400 grams weight (United States not a party). Text reprinted in 1 Am J Intl L 95 (Supp 1907).

22. See Hague Declaration, Part IV(3) (concerning expanding bullets) (cited in note 3). Text reproduced in Scott, *Hague Conventions* at 227 (cited in note 3).

23. Hague Declaration, Part IV(2) (concerning asphyxiating gases) (cited in note 3). Text reproduced in Scott, *Hague Conventions* at 225 (cited in note 3).

24. Protocol for the Prohibition of Asphyxiating, Poisonous or Other Gases (cited in note 3).

25. For a list of states so reserving, see Schindler and Toman at 121 (cited in note 7).

it is generally accepted that this protocol bars only the "first use" of poisonous gas.<sup>26</sup>

Within the past year there has been a resurgence of effort within the Geneva Conference on Disarmament to strengthen the ban on chemical weapons. Early in 1990, at the Bush-Gorbachev Summit, the United States and the Soviet Union agreed to reduce their stockpiles to twenty percent of the existing U.S. inventory by the year 2002. In addition, both agreed to terminate production of chemical weapons upon entry into force of this agreement, without waiting for a global treaty on the subject. The progress in destruction of the weapons will be monitored by on-site inspections. Both nations pledged themselves to work toward a worldwide ban on chemical weapons.<sup>27</sup>

The initiative comes too late, of course, to have any effect on the employment of chemical weapons by Iraq and, in view of that country's history of the unlawful use of chemical weapons, it is doubtful that a global treaty, even if in effect, would have deterred Iraq from the employment of such weapons if it had any capability for chemical attacks after the initial air attacks of coalition forces arrayed against it.<sup>28</sup>

The international efforts to control bacteriological weapons have been more successful. Drafted by the U.N. Committee on Disarmament, the 1972 Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological and Toxic Weapons and on their Destruction<sup>29</sup> not only prohibits the use of biological and toxic weapons in armed conflict, but it also prohibits their development, production or stockpiling. It also requires parties to destroy or divert to peaceful purposes any such agents in their possession. The convention is in force, and, as of January 1, 1990, had 110 parties, including the United States and Iraq.<sup>30</sup>

With specific reference to naval warfare, Hague VIII prohibits the use of free floating mines "except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them."<sup>31</sup> The same convention disallows torpedoes "which do not become harmless when they have missed their mark."<sup>32</sup>

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26. The official U.S. Navy operational manual adopts this interpretation. See Commander's Handbook at ¶ 10.3.1 (cited in note 11).

27. *Summit in Washington: Summary of U.S.-Soviet Agreement on Chemical Arms*, New York Times 1:8 (June 2, 1990).

28. For a discussion of Iraq's prior use of chemical agents in the Iran-Iraq War and against Kurdish dissidents in Iraq, see notes 58-59 and accompanying text.

29. [1975] 26 UST 583, TIAS No 8062 (signed April 10, 1972) (cited in note 3).

30. US Dept of State, *Treaties in Force* 292 (US Government Printing Office, 1990).

31. Hague VIII Art 1(1) at 2343 (cited in note 3).

32. *Id* Art 1(3) at 2343.

The most recent attempt to ban or regulate specific weapons or systems occurred in the United Nations-called Diplomatic Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or To Have Indiscriminate Effects, which met in 1979 and 1980 as a follow-up to the diplomatic conference which led to the 1977 Additional Protocols. This conference produced a convention of the same name.<sup>33</sup> The operative portions of the convention are contained in three protocols, the first prohibiting use of "any weapon the primary effect of which is to injure by fragments which in the human body can escape detection by X-rays."<sup>34</sup> The second contains prohibitions and restrictions on the use of land mines, booby traps and other devices.<sup>35</sup> The third deals with incendiary weapons.<sup>36</sup>

The first protocol of the Final Report, of course, is a specific ban of a particular weapon, and, if applicable, would bar employment of such a weapon by a combatant.

The restrictions on land mines and booby traps in the second protocol of the Final Report do not prohibit their use but seek to ensure that they will only be used against, or to protect, military objectives, will not unnecessarily endanger civilian persons or objects, and will be accurately mapped and recorded for later removal.<sup>37</sup>

The third protocol of the Final Report does not prohibit the use of incendiary weapons such as napalm against military objectives, but it prohibits making "the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons."<sup>38</sup> It also prohibits making a military objective within a concentration of civilians the object of attack by air-delivered incendiary weapons<sup>39</sup> and prohibits such attacks by non-air-delivered weapons except when the objective is

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33. See Final Report (cited in note 3); reprinted in 19 ILM at 1524 (cited in note 3), and Schindler and Toman at 177 (cited in note 7).

34. Protocol on Non-Detectable Fragments (Protocol I), Final Report, Annex I, Appendix B at 9 (cited in note 3), reprinted in 19 ILM at 1529 (cited in note 3), and Schindler and Toman at 185 (cited in note 7).

35. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), Final Report, Annex I, Appendix C at 10 (cited in note 3), reprinted in 19 ILM at 1530 (cited in note 3), and Schindler and Toman at 185 (cited in note 7).

36. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Final Report, Annex I, Appendix D at 16 (cited in note 3), reprinted in 19 ILM at 1534 (cited in note 3); and Schindler and Toman at 190 (cited in note 7).

37. Protocol II, Arts(3-7) at 11 (cited in note 35).

38. Protocol III, Art 2.1 at 17 (cited in note 36).

39. Id Art 2 at 17. The prohibition against using air-delivered weapons against military targets in concentrations of civilians is based on the assumption that such weapons are less accurate than weapons delivered by other systems. One wonders, however, whether this assumption holds true in all cases with the development of so-called "smart bombs" and other precision air-launched weapons, which can be guided with great precision to their targets. See discussion in text preceding note 68.



clearly separated from the non-military objects and "all feasible precautions" are taken to limit the incidental harm to civilians and civilian objects.<sup>40</sup>

The convention entered into force in 1983, but neither the United States nor Iraq is a party to it. In a statement made at signature, the United States made a declaration which included the following statement:

As indicated in the negotiating record of the 1980 Conference, the prohibitions and restrictions contained in the convention and its Protocols are of course new contractual rules (with the exception of certain provisions which restate existing international law) which will only bind States upon their ratification of, or accession to, the convention and their consent to be bound by the Protocols in question.<sup>41</sup>

It is interesting to note, with respect to Protocol I, that despite the U.S. declaration that the prohibitions and restrictions of the Protocols are contractual and bind states only upon their becoming parties to them, the official U.S. naval Commander's Handbook takes the position that "using materials that are difficult to detect or are undetectable by field x-ray equipment, such as glass or clear plastic, as the injuring mechanism in military ammunition is prohibited, since they unnecessarily inhibit the treatment of wounds."<sup>42</sup> It must be presumed that the authors of the Commander's Handbook considered the use of such materials contrary to the general principle against inflicting unnecessary suffering.

Although unable to agree on a protocol on the subject of small-caliber weapons, the participants adopted a resolution calling for further research on their wounding effects, urging governments "to exercise the utmost care in the development of small-calibre [sic] weapons systems, so as to avoid an unnecessary escalation of the injurious effects of such systems."<sup>43</sup>

It is apparent from the foregoing discussion that efforts to regulate or ban specific weapons have resulted in only modest success. The only weapons whose use is absolutely prohibited are "dum-dum" bullets, biological weapons and weapons whose primary effect is to injure by fragments which, in the human body, can escape detection by x-rays. The legality of the use of such destructive and injurious weapons as napalm,

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40. Protocol III, Art 2.3 at 17 (cited in note 36). The Protocol defines "military objective, . . . so far as objects are concerned" as "any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." *Id* Art 1.3 at 16 (cited in note 36). This is essentially a repetition of the definition of military objective contained in Art 52(2) of Additional Protocol I at 148 (cited in note 3).

41. Schindler and Toman at 196 (cited in note 7).

42. Commander's Handbook at ¶ 9.1.1 (cited in note 11).

43. Final Report, Appendix E at 18 (cited in note 3).

cluster bombs and white phosphorus shells must be judged on the basis of whether their use complies with the general rules developed earlier.<sup>44</sup>

Of note also is the fact that, despite the preeminent role of air power in modern warfare, no code of rules for air warfare has ever been incorporated into a convention of general application.<sup>45</sup> Accordingly, the legality of aircraft attacks must be judged according to the general principles outlined above and by analogy to the laws of land and sea warfare.

## B. Interdiction and Blockade

Although the initial employment of armed forces to enforce the economic sanctions against Iraq has now been overshadowed by the initiation of offensive attacks on the territories of Iraq and Kuwait, it is appropriate that this paper should include some brief reference to those measures and the legal framework governing their application. These measures, primarily naval, initially were taken by the United States on August 16 at the request of Kuwait and were justified on the basis of the inherent right of individual and collective self-defense.<sup>46</sup> Subsequently, these actions were authorized by Security Council Resolution 665 of August 25, 1990, which

[c]alls upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990).<sup>47</sup>

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44. See notes 8-18 and accompanying text. The U.S. forces used napalm in the land campaign of the Gulf War on oil-filled trenches used by Iraq as defense barriers. R.W. Apple, Jr., *Bush Demands Iraq Start Pullout Today Despite Its Assent To 3-Week Soviet Plan; Oil Fields and Trenches Aflame in Kuwait*, New York Times 1:1 (February 23, 1991). A Marine Corps aviator also stated that napalm was being dropped on bunkers, artillery positions and other emplacements, but a spokesman for the U.S. Central Command denied the latter uses. *Id.* See also J. Michael Kennedy and Melissa Healy, *Iraqis Torch Scores of the Emirate's Oil Facilities in Kuwait*, Los Angeles Times A:1 (February 23, 1991). Assuming the Central Command spokesman is correct, the coalition's use of napalm appears to be well within the limits described at notes 8-18 and accompanying text.

45. The Hague Rules of Air Warfare, drafted by a Commission of Jurists appointed by the governments of the United States, Great Britain, France, Italy, Japan and the Netherlands in a conference at The Hague in 1922-23, were never adopted in a legally binding form. For text, see Dietrich Schindler and Jiri Toman, eds, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents* at 207 (Martinus Nijhoff, 3d ed 1988) (cited in note 7).

46. US Secretary of Defense Public Affairs Guidance message 170205Z of August 1990 (copy on file with author).

47. UN SC Res 665, UN Doc S/RES/665 (1990). Resolution 661 calls for the economic embargo of Iraq. UN SC Res 661, UN Doc S/RES/661 (1990).

Although these interception measures bear a resemblance to the traditional maritime warfare measures known as blockade and contraband, the Security Council did not so label them.

A significant aspect of the United Nations resolution embargoing imports and exports from the territories of Iraq and Kuwait is the provision which states that it does not include: "supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs. . . ."<sup>48</sup>

Unlike in blockade or enforcement of contraband, ships that attempted to deliver prohibited items to or from Iraq and Iran were not subject to seizure but rather were either turned back or diverted to another destination. Medical supplies were allowed free passage, but, according to Security Council Resolution 666, foodstuffs were only to be allowed entry if the Security Council determined that humanitarian circumstances required such relief and if some humanitarian organization such as the ICRC would distribute them.<sup>49</sup> Such restraints are consistent with the provisions of both the fourth 1949 Geneva Convention on the Protection of Civilian Persons in Time of War and the 1977 Protocol I Additional to the 1949 Convention, both of which contain extensive provisions relating to relief missions for civilian populations.<sup>50</sup> In addition, Article 54 of Additional Protocol I has a specific prohibition against starvation of civilians as a method of warfare.<sup>51</sup>

At the initiation of offensive military operations by coalition forces on January 16, it would not have been surprising if they had converted the interdiction measures into a formal maritime blockade, but they did not. Presumably the measures already in force were fully effective in cutting off maritime commerce with Iraq. The traditional form of blockade was a cordon of warships stationed off an enemy coast or port to deny access to the enemy's ports by ships and aircraft of all nations, neutral as well as enemy.<sup>52</sup> It was regarded as legal so long as the blockading nation complied with certain technical rules concerning establishment, notification, effectiveness and impartiality.<sup>53</sup> With the advent of aircraft, submarines and missiles, however, nations have been reluctant to commit their warships to static positions off an enemy's port where they would be extremely vulnerable to aircraft or missile attacks. Nations desiring to deny

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48. *Id.*

49. UN SC Res 666, UN Doc S/RES/666 (1990).

50. Geneva Convention IV at Arts 59-63 (cited in note 4); Additional Protocol I, Arts 68-71 at 157 (cited in note 3).

51. Additional Protocol I at Art 54(1) (cited in note 3).

52. Lassa L.H. Oppenheim, 2 *International Law* 768 (Hersch Lauterpacht, ed) (Longmans, 7th ed 1952) ("Lauterpacht's Oppenheim"); See also Commander's Handbook at § 7.7 (cited in note 11).

53. Lauterpacht's Oppenheim at 768 (cited in note 51); Commander's Handbook at § 7.7.2. (cited in note 11).

maritime access to their enemy's ports have adopted new methods of accomplishing their goals. World Wars I and II saw the institution of the "long distance" blockade and the use of a "navicert" system to avoid having to stop and search vessels on the high seas.<sup>54</sup> In its blockades of Germany in the two World Wars, the United Kingdom supplemented the blockading fleet with a massive mine field covering extensive areas of the North Sea.<sup>55</sup> In the Vietnam War, the United States executed what was, for all intents and purposes, a blockade of the coast of North Vietnam by the use of mines alone. It laid mines which, unlike those of the British North Sea minefields of World Wars I and II, were entirely within the claimed territorial and internal waters of North Vietnam.<sup>56</sup>

In the Korean War, President Truman, carrying out the Security Council's mandate to support South Korea, proclaimed a naval blockade of the North Korean coast to be enforced by "such means and forces as are available" to the U.N. Commander (General McArthur).<sup>57</sup>

Whether the traditional law of blockade retains any vitality after the deviations from traditional practice in two World Wars and subsequent conflicts is an open question. In light of these practices, it is interesting to note the statement on this subject contained in the recently published U.S. Navy operational law manual:

The increasing emphasis in modern warfare on seeking to isolate completely the enemy from outside assistance and resources by targeting enemy merchant vessels as well as warships, and on interdicting all neutral commerce with the enemy, is not furthered substantially by blockades established in strict conformity with the traditional rules. In World Wars I and II, belligerents of both sides resorted to methods which, although frequently referred to as measures of blockade, cannot be reconciled with the traditional concept of the close-in blockade. The so-called long-distance blockade of both World Wars departed materially from those traditional rules and were [sic] justified instead upon the belligerent right of reprisal against illegal acts of warfare on the part of the enemy. Moreover, recent developments in weapons systems and platforms, particularly nuclear-powered submarines, supersonic aircraft, and cruise missiles, have rendered the in-shore blockade exceedingly difficult, if not impossible, to maintain during anything other than a local or limited armed conflict.

Notwithstanding this clear trend in belligerent practices (during general war) away from the establishment of blockades that conform to the

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54. Lauterpacht's *Oppenheim* at 792 (cited in note 52).

55. The United Kingdom justified these minefields, at least in part, by the doctrine of reprisals. *Id.* at 680. As to the doctrine of reprisals, see notes 100-104 and accompanying text.

56. See Statement of George Bush, US Representative to the United Nations, *U. N. Notified of New Measures Against North Vietnam*, May 8, 1972, reprinted in 66 Dept of State Bull 750, 751 (1972).

57. US Joint Chiefs of Staff Top Secret Message JCS 84808 to the Commander in Chief, Far East (McArthur), US Dept State 7, Foreign Relations of the United States 1950 (Korea) 271 (US Government Printing Office, 1976).

traditional rules, blockade continues to be a useful means to regulate the competing interests of belligerents and neutrals in more limited armed conflict.<sup>58</sup>

### III. ADHERENCE TO THE RULES OF WARFARE IN THE EARLY STAGES OF THE IRAQ WAR

It is perhaps dangerous to attempt to draw any conclusions about whether there has been general adherence to the law governing armed conflict in the Gulf War. Although the television, radio and printed media reports from the theater, as well as from national capitals of the warring nations, have been extensive, such news reports have been subject to censorship by both sides as well as suffering from the usual confusion and contradictions that accompany such reports. Nevertheless, in view of the timeliness of the subject, even at this early stage it would not be inappropriate to venture at least some preliminary observations.

#### A. Chemical Warfare

One of the primary concerns of the coalition armed forces was the fear that the Iraqi forces would employ chemical weapons against them or against the population of states Iraq regarded as enemies within the range of their Scud missiles. This fear obviously had some validity in view of the documented use of such agents by Iraq during the Iran-Iraq war.<sup>59</sup> It was widely believed that Iraq also used poison gas against Kurdish villagers within its own boundaries, but in view of ambiguous evidence, such use was not absolutely confirmed.<sup>60</sup> With this evidence as background,

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58. The Commander's Handbook on the Law of Naval Operations at ¶ 7.7.5 (Office of Chief of Naval Operations, 1987) (cited in note 11).

59. Several U.N. commissions confirmed that Iraq, and perhaps Iran as well, used poison gas during the Iran-Iraq war. See *Medical Experts Reports Use of Chemical Weapons in Iran-Iraq War* 22, No 5 UN Chronicle 24 (May 1985); *Iraqi Use of Chemical Weapons "On Many Occasions" Asserted by Specialists* 23, No 3 UN Chronicle 27 (April 1986); *Security Council Members Condemn Use of Chemical Weapons in Iran-Iraq Conflict* 24, No 3 UN Chronicle 33 (August 1987). On May 14, 1987 and May 9, 1988, the Security Council passed resolutions strongly condemning the repeated use of chemical weapons in the Iran-Iraq conflict without specifically singling out either party for condemnation. *Chemical Weapons Use Condemned in Security Council* 25, No 3 UN Chronicle 40 (September 1988).

60. The U.S. Department of State was sufficiently persuaded by the charges of Kurdish refugees in Turkey that they had been gassed by Iraqi forces and by the fact that their wounds were consistent with exposure to mustard gas that the U.S. government formally charged the Iraqi government with using poison gas against Iraqi villages in Iraq. See US Dept of State Statement, *Iraq's Use of Chemical Weapons*, 88 Dept of State Bull at 44 (December 1988). Also see Julie Johnson, *U.S. Asserts Iraq Used Poison Gas against the Kurds*, New York Times A:1 (September 9, 1988); Julie Johnson, *U.S. Adamant in Charge against Iraq*, New York Times A:6 (September 9, 1988). A physician from the Paris-based *Medicins du Monde* and a Turkish paramedic, however, found no evidence of injuries from poison gas among Kurdish refugees in Turkey. Alan Cowell, *Fleeing Assault by Iraqis, Kurds Tell of Poison Gas and Lives Lost*, New York Times 1:1 (September 5, 1988). A team of Turkish physicians and nurses, sponsored by the Turkish Red Crescent, concluded that their symptoms came "from malnutrition

the United States equipped its armed forces deployed in the Gulf region with gas masks and cumbersome protective clothing to shield them from the effects of nerve or mustard gas attacks. In addition, those bound for the battlefields took periodic doses of a drug that acts as a preventive treatment against nerve gas and carried with them syringe-injected antidotes which they were trained to inject through their clothing into their thighs upon exposure to nerve gas.<sup>61</sup>

One of the most dramatic television images received in the United States in the first days of the war was of Israeli civilians huddled in sealed rooms wearing gas masks. Although the Scud missiles fired at Israel from Iraq were not armed with chemical warheads, several persons reportedly died from misuse of gas masks, and a number of civilians were treated following erroneous self-injections of the nerve-gas antidote atropine.<sup>62</sup>

To the relief of all concerned, Iraq did not resort to the use of toxic agents during the war. Obviously, had Iraq done so, it would have been in violation of the 1925 Protocol,<sup>63</sup> and under its reservation concerning prior use by an enemy, the United States would not have been restrained by that protocol from responding in kind. It is interesting to note, however, that the *Washington Post*, quoting unnamed but "senior" and "knowledgeable" U.S. officials, reported that the United States would not use chemical weapons, even in retaliation if Iraq should use them.<sup>64</sup> White House spokesman Marlin Fitzwater, however, when asked if there were circumstances under which the United States would use nuclear or chemical weapons in a Gulf war replied that, "our position on the use of

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and improper medical care and poor cleanliness." Clyde Haberman, *Kurds Symptoms: Gas or Poor Diet?*, New York Times A:1, A:5 (September 12, 1988). The Turkish government backed up its medical team. Alan Cowell, *Turkey Opposes an Inquiry into Poison Gas Issue*, New York Times A:13 (September 15, 1988). Iraq formally rebuffed an attempt by the U.N. Secretary General to send an investigative team to Iraq. Paul Lewis, *Iraq Rejects Attempt by the U. N. To See if Gas Was Used on Kurds*, New York Times 1:2 (September 17, 1988). The U.N. Human Rights Commission narrowly defeated a U.S.-backed proposal to investigate human rights abuses, including allegations of the use of poison gas, by the Iraqi government. Paul Lewis, *Soviets to Accept World Court Role in Human Rights*, New York Times A:1 (March 9, 1989).

61. Sally Squires, *Chemical Warfare: What Researchers Know About How Poison Gases Affect the Body*, Washington Post, Z:13 (Health) (August 14, 1990).

62. Sabra Chartrand, *Tel Aviv: I Was Sure It Was Chemical Weapons and That I Was Dead*, New York Times 1:7 (January 19, 1991).

63. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare [1975] 26 UST 571, TIAS No 8061 (signed June 17, 1979; in force February 8, 1988) (cited in note 3).

64. R. Jeffrey Smith and Rick Atkinson, *U.S. Rules Out Use of Nuclear, Chemical Arms*, Washington Post A:1 (January 7, 1991). The article also quoted official sources to the effect that the United States would not employ nuclear weapons and confirmed that the United States did not have biological weapons in its inventory.

weapons is the same as it has always been. We simply will not comment on military operations or options.”<sup>65</sup>

## B. Attacks on Civilians (Non-Combatants)

As developed above, the law of warfare prohibits making civilians and civilian objects the target of direct attack.<sup>66</sup> Additionally, attacking forces must use means and methods of warfare that will minimize collateral damage to civilians and civilian objects.<sup>67</sup> Furthermore, attacking forces may not commit acts or threats of violence for the primary purpose of spreading terror among the civilian population.<sup>68</sup>

In the early stages of the fighting between Iraqi and coalition forces, combat operations on the coalition side consisted almost exclusively of air and missile attacks on military objectives in Iraq and Kuwait, and on Iraq's side by defensive anti-air operations and Scud missile attacks on Israeli and Saudi Arabian population centers.

According to official statements by U.S. spokespersons the U.S. and coalition air and missile attacks were carefully planned and executed to ensure that only legitimate military objectives were targeted, that only the objects targeted were struck, and that deaths and injuries to civilians and damage to civilian objects were held to the bare minimum. Although the military authorities have not released their bomb (or battle) damage assessments (“BDAs”) to the public, the few indications available to the press and public suggested that official statements reflected fact. The remarkable accuracy of the U.S. arsenal of laser-guided air-to-ground missiles, “smart” bombs and precision-programmed surface-to-surface missiles allowed precise targeting of military objectives and limitation of damage essentially to those objects with very little collateral damage. The fact that media representatives reported that they observed significant numbers of attack aircraft returning to their bases with unexpended bomb loads seemed to confirm that the coalition forces operated under tightly drawn rules of engagement to ensure that they attacked only targets which are positively identified.<sup>69</sup>

As the war has progressed, however, Baghdad aired numerous charges that coalition air attacks caused substantial damage to civilian

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65. Gene Gibbons, Regular White House Briefing, Reuter Transcripts (January 7, 1991) (NEXIS, Currnt file).

66. See notes 10-11 and accompanying text.

67. See notes 13-14 and accompanying text.

68. See note 11 and accompanying text.

69. Molly Moore, *Clouds Hinder Allied Air Strikes on Iraqi Targets*, Washington Post A:19 (January 23, 1991); R.W. Apple, Jr., *Allies Seek Out Mobile Missile Launchers In Nonstop Iraq Bombing; U.S. Losses Light*, New York Times 1:1 (January 19, 1991).

neighborhoods and caused numerous civilian casualties.<sup>70</sup> Censored reports from U.S. television reporters remaining in Baghdad described damaged apartments and commercial buildings, including an alleged baby milk factory, hit by U.S. bombs.<sup>71</sup> Some refugees who reached Jordan reported U.S. bomb explosions in civilian neighborhoods killing and wounding civilians and leaving others homeless,<sup>72</sup> while others attested to the accuracy of U.S. attacks on military objectives.<sup>73</sup> U.S. spokespersons, nevertheless, steadfastly maintained that only legitimate military, industrial and political targets were attacked.<sup>74</sup> While admitting that some collateral damage to nearby civilian infrastructure was possible, even with precision weapons,<sup>75</sup> they insisted that it was held to an absolute minimum. As charges of injury and death to civilians and damage to civilian objects has increased, a U.S. spokesman also raised the possibility that some of the alleged harm may have come from anti-aircraft debris falling to earth.<sup>76</sup> In response to Jordanian claims that coalition warplanes were attacking Jordanian tank-trucks transporting oil from Iraq to Jordan, a U.S. spokesman reiterated that coalition forces were not targeting the trucks but asserted that Iraqi trucks hiding among civilian trucks would be considered legitimate targets.<sup>77</sup> A U.S. military spokesman also reported that Iraq was moving military equipment, including aircraft, into civilian areas to protect them from allied bombardment. The spokesman reaffirmed that allied forces would not bomb such areas.<sup>78</sup>

Iraq was not as discriminating as the United States, however. The only Iraqi offensive attacks reported were Scud missile attacks against population centers in Israel and in Saudi Arabia. These attacks would seem to violate at least three of the principles developed above. In the first instance, they appear to have been targeted at densely populated cit-

70. Nora Boustamy, *Iraq, Arabs Dispute U.S. on Raids*, Washington Post A:19 (January 23, 1991).

71. Dan Balz and Rick Atkinson, *Powell Vows to Isolate Iraqi Army and "Kill It,"* Washington Post A:1, A:24 (January 24, 1991). The White House denied that U.S. forces had hit a baby milk factory, stating that U.S. intelligence information disclosed the building was a biological weapons factory, hiding behind the facade of baby milk production. *Id.* See also, Dan Balz and Rick Atkinson, *White House Braces U.S. for Months-Long War*, Washington Post A:1, A:26 (January 25, 1991).

72. Boustamy, *Iraq, Arabs Dispute U.S. on Raids* at A:19 (cited in note 70).

73. *Id.*

74. *Id.*

75. See, for example, *Baghdadis Who Fled Find No Safety From Bombs*, New York Times A:4 (February 4, 1991); Rick Atkinson and Dan Balz, *U.S.: Iraq Exploiting Civilians*, Washington Post A:1 at A:12 (February 5, 1991).

76. Pete Williams (Defense Briefer), Regular Defense Department Briefing, Fed Info Sys Corp, Federal News Service 15 (January 29, 1991).

77. Atkinson and Balz, *U.S.: Iraq Exploiting Civilians* at A:1 (cited in note 75).

78. Philip Shenon, *U.S. Battleship Shells Iraqis In Bunkers on Kuwait Coast*, New York Times A:13 (February 5, 1991). Additional Protocol I, Art 58(c) at 151 (cited in note 3) requires parties to a conflict "to the maximum extent feasible" to "[a]void locating military objectives within or near densely populated areas."



ies, violating the norm that civilians and civilian objects may not be made the object of direct attack. Secondly, assuming for the purpose of argument that there might have been legitimate military installations within the areas targeted, the means adopted (Scud missiles) were incapable of discriminating between such legitimate military targets and non-combatant persons and objects. According to the best information available from open western sources, the accuracy of Scud missiles at the distances from which they were fired is no better than about 1.5 kilometers.<sup>79</sup> And thirdly, the purpose of the attacks seems to have been meant to terrorize the population, which is outlawed.<sup>80</sup>

### C. Treatment of Prisoners of War

One of the most widely accepted conventions establishing humanitarian norms for the parties to international armed conflict is the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War.<sup>81</sup> This convention which had 167 parties as of January 1, 1990,<sup>82</sup> including all of the states engaged in the Gulf war, sets forth minimum standards for the treatment of captured members of enemy armed forces.<sup>83</sup> Among the more basic standards included in the convention are the following:

- Prisoners must be treated humanely;<sup>84</sup>
- Prisoners must be protected against acts of violence or intimidation and against insults and public curiosity;<sup>85</sup>

79. Duncan Lennox, ed, *Jane's Strategic Weapon Systems*, Issue #2 (Iraq) (Jane's, 1990).

80. See note 11 and accompanying text. On January 23, 1991, Baghdad radio quoted Saddam Hussein as saying that the Scud missiles were aimed "to disturb the sleep of the Zionists and blacken their night." Nora Boustany, *Iraq Says Its Will Is Still Unbroken, Claims Capture of More Pilots*, Washington Post A:26 (January 24, 1991).

81. Convention Relative to the Treatment of Prisoners of War [1955] 6 UST 3316, TIAS No 3364 (signed August 12, 1949; in force October 21, 1950) (cited in note 4).

82. US Dept of State, *Treaties in Force* 369 (US Government Printing Office, 1990).

83. Certain additional categories of personnel (for example, irregular troops under certain conditions, civilians accompanying the armed forces, merchant marine crews, civilian aircraft crews) are also entitled to be treated as prisoners of war if captured, unless they are entitled to more favorable treatment under some other provision of international law. Geneva Convention III (cited in note 4). Additional Protocol I extends the protection of prisoner-of-war status to certain irregular forces not included in Geneva Convention III. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) 115 (1977) Art 44 at 143, (signed June 8, 1977; in force December 7, 1978) (cited in note 3). It is doubtful, however, that this provision of the protocol can be regarded as customary law, since a number of states objected to it, including the United States. Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Advisor, US Dept of State, January 22, 1987*, 2 Am U J Intl L & Policy 460, 466 (1987). Accordingly, the discussion which follows relies solely on Geneva Convention III (cited in note 4).

84. Geneva Convention III at Art 13 (cited in note 4).

85. Id.

- Reprisals against POWs are prohibited;<sup>86</sup>
- Prisoners are entitled to respect for their persons and their honor;<sup>87</sup>
- Prisoners may not be subjected to physical or mental torture, nor any other form of coercion, to secure information from them (beyond name, rank, date of birth and serial number);<sup>88</sup>
- POWs shall be removed from the combat zone to a place of safety;<sup>89</sup>
- POWs shall have shelter against air bombardment and other hazards of war equivalent to that afforded the local civilian population.<sup>90</sup>

Preliminary reports received during the early days of hostilities, although involving only a handful of coalition POWs, did not provide grounds for optimism that Iraq would be scrupulous in its compliance with these norms. Baghdad television aired pictures of captured airmen being paraded through the streets of Baghdad. Later it telecast interviews with several apparently dazed and bruised airmen who gave "robotic" answers to questions as to their names, service and type of aircraft they flew. Two of them added statements denouncing American attacks on "peaceful" Iraq. Military analysts reviewing the telecast stated their beliefs that the statements were coerced.<sup>91</sup> Concurrently, the Iraqi military announced that because of the coalition bombing, which was "deadly" to civilians and "devoid of the minimum human standards," captured coalition airmen would be "dispersed among scientific and economic, as well as among other targets."<sup>92</sup> Subsequently, the government of Iraq announced that one of the POWs had been killed in a coalition air raid.<sup>93</sup> Shortly thereafter, the government of Iraq announced that because allied air raids targeted women and children, it would treat captured airmen as war criminals, not as prisoners of war.<sup>94</sup> The Iraqi government also announced that female prisoners of war would be treated according to Islamic law.<sup>95</sup>

The foregoing actions by the Iraqi military are in obvious violation of several of the 1949 Geneva Convention norms: those requiring shielding prisoners from insults and public curiosity, those requiring them to be moved to a place of safety and those requiring freedom from coercion to

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86. *Id.*

87. *Id.* at Art 14.

88. *Id.* at Art 17.

89. *Id.* at Art 19.

90. *Id.* at Art 23.

91. Maureen Dowd, *Bush Calls Iraqis 'Brutal' to Pilots*, New York Times A:10 (January 22, 1991).

92. Alan Cowell, *Captured Airmen Moved to Targets*, New York Times A:1, A:6 (January 22, 1991).

93. R.W. Apple, Jr., *Iran Promises Iraqi Planes Won't Rejoin the Fighting; Bush Says U.S. Is Prevailing*, New York Times A:1 (January 30, 1991).

94. Alan Cowell, *Iraq Threatens P.O.W.'s*, New York Times 1:6 (February 2, 1991).

95. R.W. Apple, Jr., *Saudis Recapture Ghost Town: Allies Bomb New Iraqi Column*, New York Times A:1, A:8 (February 1, 1991).

obtain information.<sup>96</sup> A spokesman for the International Committee of the Red Cross, a neutral, nongovernmental organization having special interest and competence in the protection of victims of war, stated, "A prisoner cannot be shown on television. He must not be used or be manipulated for political or military reasons."<sup>97</sup> Even if the statement of the Iraqi military to the effect that it was moving the airmen to likely targets "because" the coalition bombing was deadly to civilians was an attempt to justify the action as a reprisal, such justification fails because Article 13 explicitly prohibits reprisals against POWs.

Although a state is not prohibited from trying a POW for crimes committed prior to his or her capture, including war crimes,<sup>98</sup> and, moreover, under Article 129 must do so when the POW's acts amount to grave breaches of the conventions,<sup>99</sup> the POW nevertheless remains entitled to the benefits of the POW Convention, even if convicted.<sup>100</sup> Articles 87-108 contain detailed procedural protections for POWs who are subjected to judicial or disciplinary proceedings.

Female members of the armed forces who are captured by an enemy are entitled to the treatment prescribed in Geneva Convention III. Article 14 provides that they "shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men."<sup>101</sup>

#### D. Reprisals

Since in most wars at least some questionable actions have been justified as reprisals, it is appropriate to include a few paragraphs on the subject of reprisals.

As defined in the current U.S. naval manual on the law of armed conflict:

A reprisal is an enforcement measure under the law of armed conflict consisting of an act which would otherwise be unlawful but which is justified as a response to the unlawful acts of an enemy. The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict.<sup>102</sup>

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96. See notes 81-87 and accompanying text.

97. Dowd, *Bush Calls Iraqi 'Brutal' to Pilots* at A:10 (cited in note 91).

98. Geneva Convention III at Art 85 (cited in note 4).

99. Geneva Convention III at Art 130 (cited in note 4) defines grave breaches to include such acts as willful killing, torture and willfully causing great suffering. See also Geneva Convention I at Art 50 (cited in note 4); Geneva Convention II at Art 50 (cited in note 4); Geneva Convention IV at Art 147 (cited in note 4), which includes taking of hostages as a grave breach.

100. Geneva Convention III at Art 85 (cited in note 4).

101. Geneva Convention III at Art 14 (cited in note 4).

102. Commander's Handbook at § 6.2.3 (cited in note 11).

In addition to prohibitions against reprisals against POWs, the 1949 Geneva Conventions prohibit reprisals against the wounded, sick and other "protected" persons and facilities.<sup>103</sup> The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict added "cultural property" to protected objects.<sup>104</sup>

Resorting to reprisals sometimes results in the proliferation of otherwise illegal attacks by belligerents. As a result, some participants in the Diplomatic Conference which resulted in the adoption of Additional Protocols I and II sought to restrict the use of reprisals or to abolish them entirely. These efforts were partly successful, in that Additional Protocol I includes a provision that "[a]ttacks against the civilian population or civilians by way of reprisals are prohibited."<sup>105</sup> This may not be as significant for the conduct of the Gulf conflict as it may seem at first glance, since neither Iraq nor the United States is a party to that protocol. Neither is this provision one that the United States regards as a part of customary international law.<sup>106</sup>

## E. Naval Mines

As mentioned briefly above, Hague VIII prohibits the employment of free-floating mines that do not deactivate within one hour after the person laying them ceases to control them.<sup>107</sup> Within a few days of the outbreak of hostilities, the United States reported sighting free-floating mines in the Gulf,<sup>108</sup> and on January 22, the U.S. Navy reported sinking an Iraqi minelaying ship.<sup>109</sup> Two U.S. Navy ships in the amphibious task force standing off Kuwait struck mines on February 18, 1991, putting one

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103. Geneva Convention I at Art 46; Geneva Convention II at Art 47; Geneva Convention IV at Art 43 (all cited in note 4). Other protected persons include such personnel as medical personnel, chaplains, ambulance crews, Red Cross personnel, etc., Geneva Convention I at Arts 24-27, as well as civilians coming under the control of a belligerent party to the conflict or occupying power of which they are not a national. Geneva Convention IV at Art 4 (cited in note 4).

104. 249 UNTS 240 (signed June 4, 1954; in force December 15, 1957). Although the United States is not a party to this convention, the Navy manual recognizes "cultural buildings, museums, historic monuments, and other cultural objects" as exempt from attack. Commander's Handbook at ¶ 11.10.2 (cited in note 11). The United States is one of 21 parties to the 1935 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments ("Roerich Pact"), 49 Stat 3267 (1936), which protects "historic monuments, museums, scientific, artistic, educational and cultural institutions." *Id.* at Art 1.

105. Additional Protocol I at Art 51(6) (cited in note 3).

106. Sofaer, 2 Am U J Intl L & Policy at 469 (cited in note 83).

107. Convention Relative to the Laying of Automatic Submarine Contact Mines, Art 1(1), 36 Stat 2332 (signed October 18, 1907; in force January 26, 1910) (cited in note 3).

108. *War In The Gulf: Excerpts From Session on Overall War Effort: Statement of Lieut. Col. Greg Pipin*, New York Times A:7 (January 21, 1991).

109. Philip Shenon, *Saddam Hussein Carries Out Threat - US Moves on Ground*, New York Times A:1 (January 23, 1991).

of them out of action.<sup>110</sup> At the date of this writing, there is insufficient information to determine whether Iraq's use of naval mines was legal or illegal. In view, however, of Iraq's limited naval forces and the complete dominance of the waters of the Persian Gulf by the U.S. Navy, Iraqi mines did not appear to be a significant factor in the conflict.

#### F. Actions Causing Environmental Harm

In the early stages of the war Iraq released millions of gallons of crude oil into the Persian Gulf from an offshore terminal in occupied Kuwait.<sup>111</sup> This action provoked widespread outrage, not only because of the severe environmental damage it portended, but also because it did not seem to provide any military advantage to Iraq.

At least three conventions condemn actions such as that taken by Iraq. The first is the 1977 Environmental Modification Convention.<sup>112</sup> The second is Additional Protocol I.<sup>113</sup> The third is the 1982 United Nations Convention on the Law of the Sea ("Law of the Sea Convention").<sup>114</sup>

The most explicit of these is the Environmental Modification Convention, which provides in Article I:

Each State Party to this convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.<sup>115</sup>

The convention is in force and now has 60 parties,<sup>116</sup> but neither Iraq (the perpetrator) nor Saudi Arabia (the most immediate victim) is a party.

Additional Protocol I provides in Article 55 that:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.<sup>117</sup>

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110. R.W. Apple, Jr., *War in the Gulf: The Overview*, New York Times A:1 (February 19, 1991).

111. R.W. Apple, Jr., *War in the Gulf: U.S. Says Iraq Pumps Kuwaiti Oil Into Gulf*, New York Times A:1 (January 26, 1991).

112. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques [1979] 31 UST 333, TIAS No 9614 (signed December 10, 1976; in force October 5, 1978).

113. *Id.*

114. UN Doc A/CONF. 62 L2 (signed December 10, 1982), reprinted in 21 ILM 1261.

115. Environmental Modification Convention at Art I(1) (cited in note 3).

116. *Treaties in Force* at 311 (cited in note 82).

117. Additional Protocol I, Art 55(2) at 149 (cited in note 3).

Neither the United States, Iraq nor Saudi Arabia is a party to Additional Protocol I.

The 1982 Law of the Sea Convention also contains provisions which might be applicable to the deliberate spilling of oil in the marine environment. Article 194 provides, in part, that

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment. . . .<sup>118</sup>

Since none of the three conventions referred to is in effect between the parties that may be affected by Iraq's actions, the conventions cannot, of their own force, govern the transaction. This then raises the question as to whether the principle they set forth—that is, a prohibition of actions which are intended or expected to cause wide-spread, long-term and severe damage to the natural environment—expresses a norm of customary international law.

The answer is probably not. Although the Environmental Modification Convention has received fairly widespread acceptance, it is as yet not universal. And although a number of authorities have stated that the non-seabed provisions of the Law of the Sea Convention are expressive of customary international law,<sup>119</sup> others have strongly argued a contrary position.<sup>120</sup> But perhaps the most telling argument against the principle as a norm of international law is the statement of a United States official that the provision in Additional Protocol "is too broad and ambiguous and is not a part of customary law."<sup>121</sup>

Any argument as to the illegality of the Iraqi action would thus have to be based on other more general principles of the law of war or general international law such as the prohibition against direct attacks on the civilian population or civilian objects (in this case, disabling Saudi Arabian desalinization plants) or the principle of international law that a state owes a duty to protect other states from injurious acts originating within its jurisdiction.<sup>122</sup>

#### IV. CONCLUSION

Despite the brutal and dehumanizing nature of war, there are, as we have seen, international norms which attempt to mitigate some of war's horrors. The principal purposes of these norms are: first, to limit the

118. Law of the Sea Convention at Art 194(2) (cited in note 114).

119. See, for example, 2 Restatement (Third) of the Foreign Relations Law § 5 (ALI, 1987).

120. William T. Burke, *Customary Law of the Sea: Advocacy or Disinterested Scholarship?*, 14 Yale J Intl L 508 (1989).

121. Remarks of Michael J. Matheson, Deputy Legal Advisor, Department of State, 2 Am U J of Intl L & Policy 419 at 424 (cited in note 11).

122. *Trail Smelter Case* (US v Canada), 3 R Intl Arb Awards 1906, 1938 (1941).

imposition of violence, to the extent possible, to persons who have the status of combatants and to physical objects which directly contribute to the carrying out of combat operations; and second, as to those who are lawfully the objects of attack, to ensure that they are not subject to unnecessary suffering, and when they are *hors d'combat* that they receive humane treatment. With the exception of Scud attacks on civilian targets and the mistreatment of coalition POWs by Iraq, the practices of both sides of the Gulf War treated in this paper seem generally to have followed the basic precepts of the law of warfare. Unexamined and beyond the scope of this paper is the treatment of the population and infrastructure of Kuwait during the Iraqi occupation. If the widespread but unconfirmed<sup>123</sup> reports of massive torture, executions and kidnappings of the civilian population as well as massive destruction of property<sup>124</sup> prove to be true, then there may have been "grave breaches" of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War.<sup>125</sup>

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123. As of the date of editorial closure of this paper.

124. Chris Hedges, *Freed Kuwaitis Tell of Iraqi Abuse Including Some Cases of Torture*, New York Times A:1 (February 28, 1991). See also John King, *Kuwaitis Greet G.I.s With Flags, Hugs, Kisses*, Washington Post A:1 (February 27, 1991).

125. Geneva Convention IV (cited in note 4).

